

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



July 10, 2002

CA-36
7/17/2002
Agenda ID #838

TO: PARTIES OF RECORD IN APPLICATION 02-03-064

This is the draft decision of Administrative Law Judge (ALJ) Michael Galvin. It will be on the Commission's agenda at the meeting on July 17, 2002. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Pursuant to Rule 77.7(f)(9), comments on the draft decision must be filed within five days of its mailing.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. In addition to service by mail, parties should send comments in electronic form to those appearances and the state service list that provided an electronic mail address to the Commission, including ALJ Galvin at mfg@cpuc.ca.gov. Finally, comments must be served separately on the Assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious methods of service.

/s/ CARL K. OSHIRO
Carl K. Oshiro, Interim Chief
Administrative Law Judge

CKO:hkr

Attachment

Decision **DRAFT DECISION OF ALJ GALVIN** (Mailed 7/10/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SAN DIEGO
GAS & ELECTRIC COMPANY (U 902 E) for
Authority to Sell Certain Real Property in San
Diego, California to Lankford & Associates, Inc.,
general partner of Broadway Tower 655, LLC.

Application 02-03-064
(Filed March 29, 2002)

**OPINION ON AN EXCHANGE OF FOUR LOTS FOR
RELOCATION OF A SUBSTATION AND CASH**

I. Summary

We approve the sale of four lots by San Diego Gas & Electric Company (SDG&E) to Broadway Tower 655 LLC (Developer) and defer addressing the gains on sale to SDG&E's next general rate case application scheduled to be filed in December 2002 or to a Commission rulemaking that addresses gain-on-sale issues, whichever occurs first.

II. The Parties to the Transaction

SDG&E, a California corporation, is an electric and gas corporation subject to the jurisdiction of this Commission. Its principal service territory is within the Counties of San Diego and Imperial, and parts of Orange County. SDG&E's principal place of business is 8330 Century Park Court, San Diego, California 92123.

The Center City Development Corporation (CCDC) is the redevelopment agency of the City of San Diego (City). Lankford and Associates is the general partner of Broadway Tower 655 LLC (Developer).

III. The Transaction

By way of background, City through CCDC entered into an agreement with Developer to build a new office tower and residential project on a site that includes property owned by CCDC, a private party, and SDG&E. CCDC has preliminarily approved the project. On October 9, 2001, the San Diego City Council authorized CCDC to enter into a Disposition and Development Agreement with Developer. Developer has received commitments from all of the owners of parcels comprising the redevelopment site, including four lots (Lot C, D, E, and F) owned by SDG&E, subject to Commission approval.

SDG&E seeks Commission authority to sell its lots to Developer through two separate agreements. The first agreement involves Lot C, acquired in 1941 by SDG&E as part of its Harbor Substation. Lot C is currently used as a 12/4 kV step-down substation with two circuits for electric distribution operations. The source of the primary load for this substation comes from San Diego Central Cooling Company's (SDP&C) Chiller Cooling Facility located on the lots subject to the second agreement.

The terms of this first agreement provide for SDG&E to transfer Lot C to developer in exchange for SDG&E, at Developer's cost, designing and constructing a new pad-mounted transformer on a Relocation Parcel to be acquired by Developer from CCDC.¹ Under this agreement, the Harbor Substation would be decommissioned and the SDP&C load source would be reconfigured with 12kV service so that this load could connect directly to an existing SDG&E underground 12kV distribution system. This reconfiguration

¹ Parcel 1 of Parcel Map No. 15111, in the City of San Diego, County of San Diego, State of California, filed in the Office of the County Recorder of San Diego County, January 20, 1988 as File No. 88-026437, Official Records.

would eliminate the need for one of the two Harbor Substation's 4kV transformers and switchgear. The remainder of the 4kV load is to be provided with service through a pad-mounted transformer on the Relocation Parcel. Developer agrees to provide easement rights-of-way to access the new facility.

Lankford & Associates will pay for all Harbor Substation decommissioning, new 12/4kV pad mounted transformer, and SDP&C reconfiguration costs. Ratepayers will be insulated from any financial costs related to the sale and replacement of Lot C, with the exception of any environmental remediation costs related to SDG&E's existing distribution substation. A detailed project description is appended to the Application as Tab H.

The original cost of Lot C is \$2,742 and the sales price is to be an amount equal to (i) the total cost of replacing "in kind" utility services currently estimated to be between \$305,784 and \$578,688, and (ii) \$95.00 per square foot for the net square foot difference between the existing substation on the Property of 5,000 square feet and the square footage of the footprint for the substation to be constructed to replace the existing substation, exclusive of any square footage required for equipment for new service of the development.

The second agreement involves Lots D, E, and F, adjacent to Lot C. SDG&E placed these unimproved lots in rate base upon their acquisition in 1941 and kept the lots in rate base until 1977 when they were classified as non-utility property. In 1983 SDG&E entered into a 40-year net lease with Applied Energy, Incorporated, who then assigned the lease to Energy Factors. In 1984 SDG&E entered into a Standard Offer QF Agreement with Energy Factors, who assigned the lease to SDP&C, which uses those lots for chiller cooling purposes and provides the primary load for the Harbor Substation.

The original cost of Lots D, E, and F is \$7,768 and the sales price is \$1,425,000. The purchase agreement requires Commission approval of the sale of property pursuant to § 851 of the Public Utilities Code and is subject to the SDG&E/SDP&C lease.² SDG&E agrees to obtain a release of the property from Trust Indenture and Developer agrees to accept the property “as is,” “where is,” and “with all faults.” Developer also agrees to indemnify SDG&E against all liabilities for damages or injury to persons and property on the site except to the extent caused by SDG&E’s negligent or willful misconduct.

IV. Protest

The Office of Ratepayer Advocates (ORA) has protested SDG&E’s application, raising concerns about (1) SDG&E’s assertion that Pub. Util. Code § 851 does not require Commission approval of certain elements of the sale, and (2) SDG&E’s requested gain on sale treatment. ORA does not otherwise oppose the proposed transfer and sale.

V. Discussion

No public utility may sell its property that is necessary or useful in the performance of its duties to the public without first having secured the Commission’s authorization, pursuant to § 851. SDG&E believes that the sale of Lots D, E, and F is exempt from the provisions of § 851 because those lots are not currently used or useful for utility purposes. However, as a cautionary measure and pursuant to the terms of the agreements, SDG&E seeks Commission approval for the sale of Lots C, D, E, and F pursuant to § 851.

² All statutory references are to the Public Utilities Code, unless otherwise noted.

There is no dispute that Lot C is classified as utility property and subject to § 851. There is also no dispute that Lots D, E, and F have been classified as non-utility property since 1977. However, the non-utility classification, in itself, does not relieve SDG&E of its § 851 responsibilities for Lots D, E, and F. To determine whether the non-utility lots are exempt from the requirements of § 851 we look to the entire transaction involving the sale of all four of SDG&E's adjacent lots.

Each of those lots is an integral part of the City's redevelopment plan for the construction of a new office tower complex with residential units. Clearly, neither agreement can be executed without the other or impacting SDG&E's customers. Hence, we decline to exempt the lots subject to the second agreement from the requirements of § 851.

We concur with SDG&E that its proposed sales to Developer are in the public interest and in the interest of SDG&E's ratepayers. This is because the community at-large will benefit from the development of lots into an office tower complex with residential units. It is also because ratepayers will benefit from the installation and construction of a new substation at no cost to SDG&E, save possible environmental remediation costs that have yet to be determined, and continue to receive safe and reliable power. The proposed sales should be approved to the extent they comply with the California Environmental Quality Act (CEQA).

VI. Environmental Review

SDG&E seeks a determination that Commission CEQA review is unnecessary because "the City of San Diego, as lead agency, will conduct permit reviews, approvals, and be responsible for compliance with CEQA (14 CCR § 15051), the responsibility for CEQA review of substations and power plants

resides with the cities in which the plants are to be located (14 CCR § 15271); and the project falls within a categorical exemption to CEQA (14 CCR § 15302).”

We do not agree with SDG&E’s assertion that no CEQA review is required by this agency. CEQA (Public Resources Code § 21000, et seq.) applies to discretionary projects to be carried out or approved by public agencies. The Commission must act on the § 851 application and issue a discretionary decision without which the proposed project cannot proceed. Accordingly, the project is subject to CEQA review by this Commission and the Commission must act as either a lead agency or responsible agency for purposes of fulfilling its CEQA obligations. The lead agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines § 15051(b)).

In this instance we agree with SDG&E that the City is the appropriate lead agency for this proposed project under CEQA. The Commission is a responsible agency under CEQA and as such, is required to consider the environmental consequences of a project subject to its discretionary approval. In particular, the Commission is required to consider the lead agency’s environmental documentation and findings before acting upon or approving the project (CEQA Guideline § 15050(b)). The specific activities that must be conducted by a responsible agency are contained in CEQA Guideline § 15096.

We also decline to find in favor of SDG&E’s assertion that CEQA does not apply to this project by virtue of CEQA Guideline § 15271 regarding “Early Activities Related to Thermal Power Plants”, or CEQA Guideline § 15302 providing a categorical exemption for certain “Replacement or Reconstruction” activities. SDG&E’s application merely makes the general assertion that these exemptions apply, without providing facts or rationale to support the application of either in relation to the specific facts of this case. Further, as discussed below,

the City based its project approval on full CEQA review and granted no CEQA exemptions. Accordingly, to fulfill our CEQA obligations as a responsible agency we will review the City's environmental documents, findings and determinations.

In April 1992 the City released its Final Master Environmental Impact Report (MEIR, SCH# 90010898) for the Centre City Redevelopment Project, addressing the potential environmental impacts that would result from the update of the existing Centre City Community Plan and the adoption of the proposed Redevelopment Plan and other related documents. The broad project area included four sub areas (Columbia Sub Area, Marina Sub Area, Gaslamp Quarter Sub Area, and the Expansion Sub Area) encompassing approximately 1,538 acres of land in the metropolitan area. Though not specifically analyzed, project activities involving the Harbor Substation appear to be located within the Centre City East Redevelopment District, identified as part of the Expansion Sub Area. The Redevelopment Agency of the City of San Diego approved and certified the MEIR, including adoption of the Mitigation, Monitoring and Reporting Plan, by Resolution No. 2081. The MEIR was similarly approved and certified by the City Council by Resolution Nos. R-279875, R-279880.

A Final Subsequent Environmental Impact Report (SEIR, SCH# 98121003) was released in September 1999, as a supplement to the MEIR, addressing the Centre City Community Plan and Related Documents for the proposed Ballpark and Ancillary Development Projects and Associated Plan Amendments. The SEIR revised the conclusions of the MEIR to include impacts and mitigations that would result from inclusion of the Ballpark and Ancillary Developments. The SEIR also addressed certain new CEQA regulations and interpretations as well as changed conditions within the Redevelopment Project Area. The SEIR identified the Mission Valley alternative as the environmentally superior alternative and

contained a Mitigation, Monitoring and Reporting Plan to eliminate or substantially reduce potentially significant environmental impacts. The SEIR was approved and certified by the Redevelopment Agency by Resolution Nos. R-03058, R-03063, and R-03066, and was approved and certified by the City Council by Resolution Nos. R-292363, R-292366, and R-292371.

An Environmental Secondary Study was prepared in July 2001, for the proposed Broadway @ Kettner Office Building within the Centre City Development Planned District in the Centre City Redevelopment Project. In approving the project, the City found that the environmental impacts of the proposed project were essentially the same as those in the MEIR/SEIR and would have no significant effect on the environment except as identified and considered in the previous MEIR/SEIR. Accordingly the City found that no negative declaration, additional subsequent EIR, or supplement or addendum to the MEIR/SEIR was necessary or required. By Resolution R-03382 and Resolution R-295564, the Redevelopment Agency and City Council, respectively, approved and certified the Secondary Study along with its supplement (dated September 2001), and adopted the updated and activity-specific mitigations of the MMRP developed in the SEIR. Those mitigation measures were designed to reduce potential impacts in the following areas: aesthetics, air quality, cultural resources, geology and soils, hazards and hazardous materials, noise, light/glare, paleontological resources, public services/facilities, and transportation, circulation, access, and parking. Consistent with the findings for the MEIR/SEIR, the cumulative impacts of the Centre City Redevelopment project, including the proposed activity, would be significant and not fully mitigable with respect to air quality, noise, and traffic. However, the proposed activity was found in conformance with the approved Community Plan.

Finally, in February 2002, the City prepared a Supplement to the Environmental Secondary Study to determine if there would be any new and unmitigated environmental impacts as a result of the proposed removal and replacement of the Harbor Substation, associated with the Broadway @ Kettner Office Building project. For the same reasons as identified in the Environmental Secondary Study, it was determined that the proposed activity would have no significant impact beyond those identified in the previous environmental documents, and thus no negative declaration, subsequent EIR, supplement or addendum were required to be prepared. In approving and certifying the proposed activity, the Redevelopment Agency (Resolution No. R-03444) and City Council (Resolution No. R-296211) adopted the mitigation measures adopted by the SEIR and Environmental Secondary Study.

We find that the City prepared adequate environmental documents for purposes of our CEQA review as a responsible agency, and adopted feasible mitigation measures to address potential significant environmental resulting from the proposed project that is the subject of this application. Accordingly, we adopt the findings and conclusions of the City as reasonable for the proposed project and require compliance with the mitigation measures specified in the MEIR/SEIR and Environmental Secondary Study for purposes of our approval of the removal and replacement of the Harbor Substation.

VII. Gains on Sale

There is a dispute as to who should benefit from the gains on sale associated with this transaction. SDG&E seeks to allocate the entire net gain to its shareholders. In support of its position, SDG&E cites D.94-01-028, a matter involving Suburban Water Systems, in which shareholders benefited from the entire gain on sale of non-depreciable rate base real property.

ORA opposes allocating the entire gain on sale solely to the shareholders of SDG&E on the basis that: ratepayers should receive the gains of sales made after electric restructuring because ratepayers have borne the risks and costs associated with that restructuring; shareholders bear essentially no risk associated with the properties transferred because they are real property in San Diego; SDG&E has not demonstrated that condemnation will occur if a voluntary sale and transfer does not take place, and thus may not be subject to condemnation gain on sale rules to benefit shareholders; and, that SDG&E has not demonstrated that mitigation measures specified in D.89-07-016 have been considered and enacted.³

Given ORA's prior objection to the proposed treatment of gains on sale, SDG&E requests that the proposed sale be approved promptly and that the issue of gains on sale be deferred to a separate proceeding.⁴ ORA concurs with SDG&E.

It is in the public interest to issue an order approving the sale of those lots and to defer addressing the entire net gain to a separate proceeding.⁵ This issue should be addressed in SDG&E's next general rate case application or in a Commission rulemaking addressing gain-on-sale issues expected to be issued as

³ May 13, 2002 Protest of the Office of Ratepayer Advocates to Application of San Diego Gas & Electric Company for Authority to Sell Four Lots.

⁴ See Application at page 3.

⁵ In D.02-04-005, dated April 4, 2002, RE: Pacific Gas and Electric Company and the City and County of San Francisco, at pages 4-5, we stated that the proper accounting and ratemaking proceeding related to gain-on-sale issues should be deferred to a future proceeding, consistent with D.01-10-051, where we addressed the future issuance of a rulemaking proceeding to address gain-on-sale issues.

resources and priorities allow, whichever occurs first. Until the issue is resolved, SDG&E should track the gain on sale in real property and any remediation costs resulting from approval of this sale in a Sales Memorandum Account.

SDG&E seeks expedited Commission approval of this application to avoid CCDC from starting condemnation proceedings against SDG&E on June 12, 2002 to obtain those lots, and to avoid incurring additional legal fees, approximately \$300,000 in demolition costs, and negotiating a new purchase price. ORA does not oppose expedited approval of this application. Because this application is noncontroversial as to the sale of lots, in the public interest, and all parties recommend expedited approval, this application should be approved on an expedited basis. Therefore, the applicable 30-day period for public review and comment is being reduced to five days upon stipulation of all parties pursuant to § 311(g)(2).

VIII. Procedural Matters

SDG&E has requested that this matter be categorized as ratesetting and states that no hearings are necessary. By Resolution ALJ 176-3086, dated April 22, 2002, the Commission preliminary determined that this was a ratesetting proceeding and that no hearings were expected.

Notice of this application appeared in the Commission's Daily Calendar of April 12, 2002. There is no objection to the ratesetting categorization of this proceeding. With no opposition to the categorization of this proceeding, we affirm that this is a ratesetting proceeding. No hearings are required.

Findings of Fact

1. SDG&E is an electric and gas corporation subject to the jurisdiction and regulation of the Commission.

2. SDG&E's Lot C has been the site of its Harbor Substation and classified as utility property since 1941.

3. The original cost of Lot C is \$2,742 and the sales price is to be an amount equal to the total cost of replacing in kind utility services and \$95 per square foot for the net square foot difference between the existing substation on the Property of 5,000 square feet and the square footage of the footprint for the substation to be constructed to replace the existing substation.

4. SDG&E's Lots D, E, and F, adjacent to Lot C, are unimproved lots classified as utility property and included in rate base from 1941 until 1977 when they were transferred to non-utility property.

5. The original cost of Lots D, E, and F is \$7,768 and the sales price is \$1,425,000.

6. Lots D, E, and F are currently the subject of a 40-year lease with SDP&C, which uses those lots for chiller cooling purposes and provides the primary load for the Harbor Substation.

7. The City is the lead agency for purposes of compliance with the California Environmental Quality Act (CEQA, Public Resources Code Section 21000 et seq., CEQA Guidelines Section 15051(b)).

8. The Commission is a responsible agency for purposes of compliance with CEQA and is required to review the final environmental documents prepared by the City (CEQA Guidelines Sections 15050(b) and 15096).

9. Related to the proposed project which is the subject of this application the City prepared a Final MEIR, a Final SEIR, an Environmental Secondary Study and Supplement, and a Supplement to the Environmental Secondary Study, including respective Mitigation, Monitoring and Reporting Plans.

10. Each of the environmental documents prepared by the City were certified by the City Redevelopment Agency and the City Council by Resolutions and

including Mitigation, Monitoring and Reporting Plans as specified in this decision

11. A dispute exists between SDG&E and ORA on how the gains on sale and remediation costs should be accounted for, as well as the applicability of Pub. Util. Code § 851 to certain elements of this transaction.

12. SDG&E and ORA agree that this application should be approved on an expedited basis.

Conclusions of Law

1. A public hearing is not necessary.
2. The proposed sale, as set forth in the application, is subject to § 851 and is in the public interest.
3. The sale of lots does not require further CEQA review.
4. The issue of gains on sale and any remediation costs should be deferred to another proceeding.
5. The authority being granted by this order is not a finding of the value of the rights and property to be transferred.
6. The City prepared adequate environmental documents for purposes of our CEQA review as a responsible agency, and adopted feasible mitigation measures to address potential significant environmental impacts resulting from the proposed project.
7. We adopt the findings and conclusions of the City for the proposed Harbor Substation removal and replacement and require compliance with the Mitigation, Monitoring and Reporting Plan as specified in the City's MEIR/SEIR and Environmental Secondary Study for purposes of our project approval.
8. The applicable 30-day period for public review and comment should be reduced to five days, as stipulated by the parties.

9. The application should be granted to the extent provided in the following order and the order should be effective today to allow the sale to occur expeditiously.

O R D E R

IT IS ORDERED that:

1. San Diego Gas & Electric Company (SDG&E) may sell and convey four of its lots to Broadway Tower 655, LLC in exchange for the relocation of SDG&E's Harbor Substation and cash, as detailed in the agreements attached to the application.

2. SDG&E shall record all revenues and any remediation costs resulting from approval of this sale in a Sales Memorandum Account. The disposition of the gain on sale of real property net of any remediation costs shall be addressed in SDG&E's next general rate case application or in a Commission rulemaking addressing gain on sale issues, whichever occurs first.

3. Compliance with the Mitigation, Monitoring and Reporting Plan specified in the City's MEIR/SEIR and Environmental Secondary Study is a condition of the approval granted in this decision.

4. The application is granted as set forth above.

5. Application 02-03-064 is closed.

This order is effective today.

Dated _____, at San Francisco, California.